

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Promoting Efficient Use of Spectrum)	WT Docket No. 00-230
Through Elimination of Barriers to the)	
Development of Secondary Markets)	

REPLY COMMENTS OF T-MOBILE USA, INC.

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TABLE OF CONTENTS

I.	THE COMMISSION SHOULD FORBEAR FROM APPLYING FOREIGN OWNERSHIP DECLARATORY RULING REQUIREMENTS FOR TRANSACTIONS WHERE SUCH RULINGS HAVE PREVIOUSLY BEEN OBTAINED, EITHER BY THE PARTIES TO THE TRANSACTION OR THEIR CORPORATE PARENTS	2
II.	A SECONDARY MARKETS APPROACH IS THE BEST MECHANISM FOR PERMITTING “OPPORTUNISTIC” DEVICES TO OPERATE ON LICENSED SPECTRUM	5
III.	THE COMMISSION SHOULD REFRAIN FROM TAKING AN EXPANSIVE ROLE AS A MARKET MAKER OR INFORMATION CLEARINGHOUSE.....	6
IV.	THE COMMISSION SHOULD APPLY ITS FORBEARANCE AUTHORITY TO <i>DE FACTO</i> TRANSFERS OF CONTROL AND ASSIGNMENTS OF LICENSES.....	6
V.	CONCLUSION.....	8

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T-Mobile USA, Inc. (“T-Mobile”)¹ submits reply comments in response to the Federal Communications Commission’s (“Commission”) October 6, 2003 Further Notice of Proposed Rulemaking,² seeking comment on further policy and rule changes to facilitate the development of secondary markets and to promote more flexible and more efficient spectrum use. T-Mobile applauds the actions the Commission has taken to promote secondary spectrum markets, as well as its willingness to consider expanding on these actions as outlined in the *Further Notice*.

T-Mobile requests that the Commission forbear from applying foreign ownership declaratory ruling requirements in certain situations. As explained below, without taking this step, the forbearance procedures could unnecessarily and inefficiently inhibit certain entities with approved indirect foreign ownership in excess of 25 percent from taking advantage of many of

¹ T-Mobile USA is the sixth largest national wireless provider in the United States with licensees covering approximately 95 percent of the U.S. population and currently serving over twelve million customers. T-Mobile USA is a wholly-owned subsidiary of Deutsche Telekom, AG and is part of its T-Mobile wireless division. Via its HotSpot service, T-Mobile USA also provides Wi-Fi (802.11b) wireless broadband Internet access in more than 3,500 convenient public locations, such as Starbucks coffeehouses, Borders bookstores, Kinko’s locations, airports, and airline clubs, making it the largest carrier-owned Wi-Fi network in the world. All comments filed on December 5, 2003, in WT Docket No. 00-230 will hereinafter be short cited.

² *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking*, WT Docket 00-230, FCC 03-113 (Oct. 6, 2003) (portions referred to herein as “*Report and Order*” or “*Further Notice*,” as applicable).

the benefits of the liberalized secondary markets regime. T-Mobile also supports certain comments previously submitted in this proceeding urging the Commission (i) to rely on the new secondary markets regime to support the development of opportunistic radio devices, (ii) to allow the private sector to develop information clearinghouses, and (iii) to apply its forbearance authority to certain transfers of control and assignments of licenses based on criteria similar to those proposed for use in the leasing context.

I. THE COMMISSION SHOULD FORBEAR FROM APPLYING FOREIGN OWNERSHIP DECLARATORY RULING REQUIREMENTS FOR TRANSACTIONS WHERE SUCH RULINGS HAVE PREVIOUSLY BEEN OBTAINED, EITHER BY THE PARTIES TO THE TRANSACTIONS OR THEIR CORPORATE PARENTS.

Notwithstanding the clear benefits of forbearance in a variety of spectrum leasing and license assignment and transfer contexts, many carriers and other spectrum users might be deprived of many of these benefits because of their foreign ownership under certain proposals in the *Further Notice*. In the *Report and Order*, the Commission stated that lessees must certify that they do not have more than one-quarter indirect foreign ownership, or have obtained the necessary declaratory ruling approving the higher foreign ownership.³ In the *Further Notice*, the Commission sought comment on whether it should extend the forbearance procedures already adopted for spectrum manager leasing to certain categories of (i) *de facto* transfer leasing and (ii) license assignments and transfers of control. Many commenters supported expanding the forbearance process as serving the public interest. However, the Commission proposed that a condition of eligibility for forbearance in these expanded leasing and assignment/transfer

³ If “a potential spectrum lessee has more than one-quarter indirect alien ownership and has not yet received a declaratory ruling establishing its eligibility regarding the lease of spectrum in the particular service at issue, . . . then it may not enter into this type of leasing arrangement.” *Report and Order* ¶ 110 n. 240; *see also* ¶¶ 143, 174.

contexts would be that the lessee/assignee/transferee obtain a declaratory ruling in advance should its indirect foreign ownership exceed 25 percent.⁴

T-Mobile is concerned about extending these conditions for certain classes of transactions involving indirect foreign ownership in excess of the 25 percent benchmark contained in Section 310(b)(4). While T-Mobile recognizes that prior approval may be appropriate for entities not having previously received clearance from the Commission, T-Mobile is concerned that the Commission's proposals here – if taken literally – might introduce unnecessary regulatory hurdles for certain categories of transactions that pose no real risks to national security or other important public interest considerations.

Specifically, in T-Mobile's experience, the Commission has required that the licensee entity itself must receive its own declaratory ruling for indirect foreign ownership levels above 25 percent prior to consummation of the relevant transaction, even if the licensee entity is or is to be 100 percent owned by entities that are the subject of a declaratory ruling. Under existing license assignments and transfers of control procedures, the requirement for obtaining a declaratory ruling generally has not delayed transactions, because the petition for declaratory ruling and the long form assignment or transfer application are filed and generally processed concurrently.⁵

In the context of the forbearance proposals contained in the *Further Notice*, however, T-Mobile effectively would be prevented from consummating many transactions without Commission consent because the lessee or new licensee would need to file and await a grant of a petition for declaratory ruling on foreign ownership, even if the 100 percent parents of the lessee

⁴ See *Further Notice* ¶¶ 254, 281.

or new licensee already had their foreign ownership levels approved. For example, should T-Mobile propose to designate an entity within its corporate family that was not itself the subject of a declaratory ruling, then it could not avail itself of the streamlined forbearance processing in the context of license assignments or any spectrum leasing, because it would have to file and await the grant of a petition for declaratory ruling.

There are a variety of legitimate business reasons why T-Mobile might, for example, want a spectrum lease or license to be held by another entity that is, or as a result of the transfer will be, within its corporate family. As long as ultimate foreign ownership remains the same, T-Mobile can see no overriding regulatory objective in requiring it to seek a declaratory ruling on foreign ownership in advance of consummating such a transaction. To correct this anomalous result, T-Mobile asks that the Commission permit spectrum leases or license assignments or transfers of control to be eligible for forbearance if *either* (i) the proposed lessee, assignee or transferee has obtained a declaratory ruling for foreign ownership above 25 percent *or* (ii) the 100 percent direct or indirect parent of the lessee, assignee or transferee has obtained such a declaratory ruling. This will insure that T-Mobile and other entities with approved indirect foreign ownership in excess of 25 percent can avail themselves of the forbearance procedures in the case of eligible spectrum leases and license assignments and transfers of control. The benefits to the public in terms of new service offerings and more efficient spectrum use can be best achieved through this approach, with no negative impacts on the Commission's policies with respect to foreign ownership.

⁵ Even in the context of long form application procedures, T-Mobile has experienced delays in the ability to consummate certain transactions because the long form transfer or assignment application has been granted prior to

II. A SECONDARY MARKETS APPROACH IS THE BEST MECHANISM FOR PERMITTING “OPPORTUNISTIC” DEVICES TO OPERATE ON LICENSED SPECTRUM.

For the reasons discussed below, T-Mobile agrees with CTIA and other parties that a secondary markets approach to “opportunistic” or “smart” devices is the best way to promote fairness, efficiency, and innovation.⁶ A secondary markets approach, requiring the user of the “smart” device to lease spectrum from the licensee, will promote the efficient use of spectrum and competition among licensees and other operators.

A secondary markets approach, as opposed to an unlicensed underlay approach, would allow licensees to require that interference remain at acceptably low levels and to provide contractual remedies for failure to comply with interference requirements. A secondary markets approach to opportunistic devices is fair and efficient, encourages innovation, and protects the integrity of the licensee’s spectrum rights.

The Commission is at the very beginning stages of exploring the potential of opportunistic devices. It has just proposed to permit the use of such devices on an unlicensed basis in spectrum not yet subject to an exclusive license or the intensive use that most PCS spectrum is currently experiencing. It should let these preliminary initiatives proceed before expanding this untried approach into exclusively licensed and heavily utilized bands. In the latter cases, in keeping with its market-based philosophy,⁷ the Commission should first gain

the grant of the petition for declaratory ruling on foreign ownership.

⁶ See CTIA Comments at 5-6; *see also* Cingular Comments at 8-12; SBC Comments at 6; Sprint Comments at 2-4; Verizon Comments at 3-5.

⁷ See, e.g., *Report and Order* ¶ 2 (concluding that spectrum leasing policies should “continue our evolution toward greater reliance on the marketplace”); *Amendment of the Commission’s Rules Concerning Maritime Communications*, Second Memorandum Opinion and Order and Fifth Report and Order, 17 F.C.C.R. 6685, 6687, ¶ 3 (2002); *Southwestern Bell Mobile Systems, Inc.*, 14 F.C.C.R. 19898, 19902, ¶ 9 (1999); *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 F.C.C.R. 10030, 10032-35, ¶ 4 (1999).

experience in the evolution of its recently announced secondary market regime before embarking on a more intrusive path to opportunistic devices. Such an approach would be fully consistent with the Spectrum Task Force's recommendation that the Commission should enhance its utilization of the "exclusive rights and common models" of spectrum usage.⁸

III. THE COMMISSION SHOULD REFRAIN FROM TAKING AN EXPANSIVE ROLE AS A MARKET MAKER OR INFORMATION CLEARINGHOUSE.

Given the Commission's increased reliance on market forces, T-Mobile supports Verizon's and other commenters' view that the Commission should allow private market forces to govern the exchange of secondary market information.⁹ No persuasive evidence has been furnished to demonstrate that the Commission should depart from its tentative conclusion that "the private sector is better suited both to determine what types of information parties might demand, and to develop and maintain information on the licensed spectrum that might be available for use by third parties."¹⁰ There is no indication that markets will fail to provide the necessary information to enable secondary transactions in spectrum and, in the absence of empirical evidence, or at least a convincing theoretical case, of such a market failure, the Commission should stay its hand and not intervene.

IV. THE COMMISSION SHOULD APPLY ITS FORBEARANCE AUTHORITY TO *DE FACTO* TRANSFER LEASING AND TRANSFERS OF CONTROL AND ASSIGNMENTS OF LICENSES.

T-Mobile agrees with CTIA and other parties' position that the Commission should forbear from prior Commission approval of certain categories of *de facto* transfer leases and

⁸ Spectrum Policy Task Force Report, ET Docket 02-135, at 65 (Nov. 15, 2002).

⁹ See Verizon Comments at 1-3; see also CTIA Comments at 6; Cingular Comments at 14-15; PCIA Comments at 3; Sprint Comments at 6-7.

¹⁰ *Further Notice* ¶ 226 (citation omitted).

license transfers and assignments.¹¹ By implementing this proposal, the Commission would foster a more efficient marketplace by reducing unnecessary delays and transaction costs as uniformly as possible for a wide variety of transaction structures.

While aiding in the establishment of a more efficient marketplace, a notification process would not deprive the Commission of its regulatory role to ensure that transactions in spectrum are consistent with the public interest. A notification filed shortly after the lease became effective would contain the same essential information as an application.¹² Although it would replace the prior approval process, a notification system would still provide the Commission with sufficient information to investigate the transaction or require the parties to modify the relevant transaction even after it has been concluded. By extending its forbearance from the prior approval process to a broader range of lease arrangements, the Commission's regulatory oversight role would not suffer and the Commission would create a more equitable, dynamic spectrum market.

¹¹ See CTIA Comments at 3-4; *see also* SBC Comments at 7.

¹² See Nextel Comments at 7.

V. CONCLUSION.

The Commission should forbear from foreign ownership declaratory ruling requirements in transactions where such declaratory rulings have previously been obtained. The Commission should also adopt a secondary markets approach for granting spectrum access to opportunistic devices. The Commission should also rely on market forces to establish market makers or an information clearinghouse. Finally, the Commission should expand its forbearance authority to *de facto* transfer leases and transfers of control and assignments of licenses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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